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COMMENT

THE IMPACT OF *AUSTIN v. UNITED STATES*: EXTENDING CONSTITUTIONAL PROTECTIONS TO CLAIMANTS IN CIVIL FORFEITURE PROCEEDINGS

[T]he Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated merely because a guilty man may escape prosecution or for any other expedient reason.¹

In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that [the Fourth Amendment] represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts.²

I. INTRODUCTION

Kevin and Bridget Perry live in a small mobile home in Ossipee, New Hampshire.³ Their three children sleep in the single

1. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 184 (1962) (holding § 401(j) of the Nationality Act of 1940, and § 349 of the Immigration and Nationality Act of 1952 unconstitutional because they are essentially penal in character and inflict severe punishment without due process of law and without the safeguards of the Fifth and Sixth Amendments).

2. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (holding the warrantless search of an automobile parked in a driveway, incident to a lawful arrest which took place inside the home, unreasonable and a violation of the Fourth Amendment).

3. See Dennis Cauchon, *Are Seizures 'Legalized Theft'?*, USA TODAY, May 18, 1992, at A1. The article tells the story of the Perrys and of others whose lives have been turned upside down by civil forfeiture proceedings. The article also discusses abuse of civil forfeiture laws by law enforcement agencies and officials, as well as some of the problems

bedroom while Kevin and Bridget share a fold-out couch.⁴ In September of 1988 the Perrys were arrested for growing four marijuana plants behind their house. They eventually plead guilty to a charge of *misdemeanor* possession of marijuana.⁵ The Perrys felt they had made a mistake. They also believed they had paid for that mistake. Unfortunately the United States government did not agree. One month later, the Perrys received a registered letter notifying them that the government was instituting civil forfeiture proceedings against their 27-year-old mobile home. The government seized the Perry home for "facilitating" their crime, threatening the family with homelessness.⁶

Richard Lyle Austin lives in a small mobile home in Garreston, South Dakota. He also owns an auto body repair shop in the same town. In June of 1990, Austin pleaded guilty to, and was convicted of, one count of possession of cocaine with intent to distribute.⁷ He was sentenced to seven years in prison.⁸ According to a police affidavit, Austin brought two grams of cocaine from his home to his body shop to consummate a prearranged sale. No money was ever exchanged.⁹ Shortly after his conviction, the United States government instituted civil forfeiture proceedings and seized Mr. Austin's home and business.¹⁰

For each story recounted here, there are countless others like them.¹¹ Concern that the value of seized property may be

inherent in civil forfeiture proceedings. One example discussed is that once the government has shown that it had reason to believe that the property was subject to forfeiture, the burden of proof shifts to the owner, who must show that his or her property was innocent.

4. *See id.*

5. *See id.*

6. *See id.*

7. *United States v. 508 Depot St.*, 964 F.2d 814, 815 (8th Cir. 1992), *rev'd sub nom Austin v. United States*, 113 S. Ct. 2801 (1993) (holding the Eighth Amendment's Excessive Fines Clause not applicable to forfeiture proceedings under 21 U.S.C. §§ 881(a)(4) and (a)(7) because they are in rem actions that are civil by statutory definition).

8. *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993).

9. *508 Depot St.*, 964 F. 2d at 816.

10. *Id.*

11. *See, e.g., Man Wants \$250,000 For Seized Yacht*, UNITED PRESS INTERNATIONAL, May 19, 1992. The article reported that in 1990 David Stebbins' yacht the "Lazy Girl" was seized by federal agents. Stebbins was trying to sell the "Lazy Girl" but in the meantime was chartering the boat. Someone who chartered the boat used it as a meeting place to sell drugs to an undercover federal agent. Two years later Stebbins, an innocent owner, got the yacht back from the government with \$85,000 in damage from improper storage. Stebbins had already been forced to pay the government \$23,000 in fees for

grossly disproportionate to the crime committed or allegedly committed by the owner of the property¹² has prompted cries for reform from organizations like the National Association of Criminal Defense Lawyers (NACDL).¹³ Concern about forfeiture abuse has also resulted in some unlikely political alliances.¹⁴

This comment will first provide a brief historic overview of civil forfeiture and the Eighth Amendment's Excessive Fines Clause.¹⁵ The comment will then discuss how the guilty property fiction¹⁶ and previous court interpretations of the Eighth Amendment have interacted to prevent proportionality review of civil forfeitures. Next, the comment will examine the Supreme Court decision in *Austin v. United States*¹⁷ and its potential impact on civil forfeiture law. Additionally, this comment will explore the potential of *Austin* to extend further constitutional protections to parties in civil forfeiture proceedings. Finally, this comment will conclude that, in light of the *Austin* decision, the guilty property fiction must be discarded.

storage of the boat.

12. Criticism of government abuse of civil forfeiture proceedings is not limited to issues of proportionality. See, e.g., Daryl Kelley, *Ventura D.A. Says Fatal Raid Was Unjustified*, LOS ANGELES TIMES, March 30, 1993, at A1. In the fall of 1992, a Los Angeles County sheriff's deputy shot and killed millionaire Don Scott in his home during a drug raid. In March of 1993, Ventura County District Attorney Michael D. Bradbury issued a report on the raid concluding that there was no legal justification for the search warrant. No drugs of any kind were discovered in the raid which the D.A. characterized as "an example of the war on drugs gone awry." Bradbury also concluded, given that federal law allows drug enforcement agencies to retain the proceeds of drug forfeitures, the raid may have been prompted by a desire to seize Scott's \$5 million ranch. *Id.*

13. See Laura Duncan, *Defense Bar Urges Congress to Reform Federal Asset Forfeiture Law*, CHICAGO DAILY LAW BULLETIN, September 30, 1992, at 3. The article reports that the NACDL is urging Congress to reform federal forfeiture statutes which they claim have been widely abused.

14. See Naftali Bendavid, *Asset Forfeiture: Ripe for Reform*, THE RECORDER, July 8, 1993. The article reports that when Representative Henry Hyde, a conservative Republican from Illinois known for his hard line approach to crime, held a press conference to announce his proposed asset forfeiture reform bill, he was joined by Nadine Strossen, president of the American Civil Liberties Union (ACLU).

15. U.S. CONST. amend. VIII.

16. See, e.g., *United States v. United States Coin & Currency*, 401 U.S. 715, 719 (1971) ("Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing.") This concept is hereinafter referred to as "the guilty property fiction."

17. *Austin v. United States*, 113 S. Ct. 2801 (1993) (holding civil forfeiture under 21 U.S.C. §§ 881(a)(4) and (a)(7) constitutes punishment and as such is subject to the Eighth Amendment's Excessive Fines Clause).

II. OVERVIEW OF CIVIL FORFEITURE AND THE EIGHTH AMENDMENT

A. THE GUILTY PROPERTY FICTION

Historically, civil forfeiture has been characterized as a proceeding in rem.¹⁸ The basis for an in rem forfeiture action has been the legal fiction that the property committed and is charged with the wrong.¹⁹ The historic characterization of civil forfeiture as a proceeding in rem enables the government to seize the personal²⁰ and real property²¹ of private citizens without the constitutional protections traditionally provided to *persons* charged with wrongdoing.²² The Eighth Amendment's Excessive Fines Clause has been among the constitutional protections held not to apply in civil forfeiture proceedings.²³ Courts have thus been unwilling to conduct proportionality review of seizures made pursuant to civil forfeiture statutes.²⁴

1. *English Roots*

The evolution of the guilty property fiction is a long and confusing one.²⁵ Its Judeo-Christian roots have been traced by

18. See *United States v. United States Coin & Currency*, 401 U.S. 715, 719 (1971).

19. *J.W. Goldsmith, Jr. - Grant Co. v. United States*, 254 U.S. 505, 510 (1921). The Court stated that civil forfeiture is a doctrine which "ascribe[s] to the property a certain personality, a power of complicity and guilt in the wrong."

20. 21 U.S.C. § 881(a)(2), (3), (4), (5) and (6) (providing for the forfeiture of raw materials, products, equipment, containers, conveyances, books, records, moneys, negotiable instruments, securities, or other things of value which are used, or intended for use in facilitating the manufacture, transportation, concealment, sale, or possession any controlled substance, in violation of the statute).

21. 21 U.S.C. § 881(a)(7) (1993) (providing for the forfeiture of real property, appurtenances, and improvements, used or intended for use to commit or facilitate the commission of a controlled substance violation punishable by more than one year in prison).

22. See Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911 (1990). Examples of constitutional protections traditionally provided to *persons* charged with wrongdoing include the prohibition against cruel and unusual punishment and the prohibition against double jeopardy. *Id.* at 921-23.

23. See, e.g., *United States v. On Leong Chinese Merchants Ass'n Bldg.*, 918 F.2d 1289 (7th Cir. 1990).

24. See *United States v. 141st St. Corp.*, 911 F. 2d 870, 881 (1990) (stating that proportionality review does not apply in civil forfeiture proceedings).

25. See Piety, *supra* note 22, at 927, for an in depth discussion of the history of in

American courts and by legal scholars, to the biblical quotation “(i)f an ox gore a man or a woman, and they die, [the ox] shall be stoned and his flesh shall not be eaten.”²⁶ This practice reflected the view that the instrument of death was guilty of a wrong which required atonement.²⁷ The idea of religious expiation was carried into the English Common law in the form of deodand.²⁸ The word deodand is derived from the Latin *Deo dandum*, literally “to be given to God.”²⁹

Under the law of deodand, the value of an instrument of death, be it animate or otherwise, was forfeited to the King.³⁰ The King was to use the value of the forfeited property to assure that masses were said for the “good of the dead man’s soul.”³¹ In its later incarnation any religious purpose was officially eliminated and the deodand became a source of crown revenue.³² The deodand tradition was justified at this point in its history as a penalty for carelessness.³³ Indeed, the abolition of the deodand in England in 1846 went hand in hand with the passage of Lord Campbell’s Act, which created a cause of action for wrongful death.³⁴

England also recognized a form of common law forfeiture

rem forfeiture.

26. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.17 (1974) (citing *Exodus* 21:28-30). See also, O. HOLMES, *THE COMMON LAW*, 24-25 (Boston, Little, Brown, & Co. 1881); but see, Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 *TEMP. L.Q.* 169 (1973) (criticizing the reliance on this biblical quotation to support the guilty property fiction).

27. See O. HOLMES, *THE COMMON LAW*, 24-25 (Boston, Little, Brown, & Co. 1881).

28. See *id.*

29. *Calero-Toledo*, 416 U.S. at 681 n. 16.

30. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *300. Thus if a cart ran over a man and killed him, the cart owner was required to pay to the crown the value of that cart, so the cart might atone for its wrong. *Id.*

31. *Id.* Masses were required because the victim, having died a sudden death, was denied the opportunity to have the last rights administered.

32. See *Calero-Toledo*, 416 U.S. at 681.

33. BLACKSTONE, *supra* note 30, at *301 (“[Deodands were] grounded upon this additional reason, that such misfortunes [wrongful deaths] are in part owing to the negligence of the owner [of the property forfeited], and, therefore, he is properly punished by such forfeiture.”)

34. *Calero-Toledo*, 416 U.S. at 681, n.19 (“Passage of the two bills was linked, because Lord Campbell was unwilling to eliminate the deodand institution, with its tendency to deter carelessness, particularly by railroads, unless a right of action was granted to the dead man’s survivors.”) (citing 1 MATHEW HALE, *PLEAS OF THE CROWN* 419, 423-24 (1st Am. ed. 1847)).

known as forfeiture of estate.³⁵ Those convicted of a felony or of treason forfeited all of their real and personal property to the crown.³⁶ Additionally, English law provided for statutory forfeiture of certain "offending objects" used in violation of custom and revenue laws such as the Navigation Acts of 1660.³⁷

2. *Early American Forfeiture Law*

Neither deodand nor forfeiture of estate became part of the common law in the United States.³⁸ However, the Supreme Court has observed that civil forfeiture is "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer."³⁹

Before the adoption of the Constitution, the Colonies used in rem forfeiture proceedings to seize offending objects pursuant to both local and English statutes.⁴⁰ Shortly after the Constitution was adopted, the new federal government enacted statutes that authorized the government to exercise in rem jurisdiction over ships and cargoes involved in customs offenses.⁴¹ These

35. 4 WILLIAM BLACKSTONE, COMMENTARIES *383-84. Blackstone traces the law of forfeiture of estate for the crime of treason not to feudal policy, but to the Scandinavian Constitution which was transmitted to the British Isles via their "Saxon ancestors."

36. 4 WILLIAM BLACKSTONE, COMMENTARIES *382. "The natural justice of forfeiture or confiscation of property for treason(s) is founded on this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between King and people, hath abandoned his connections with society, and hath no longer any right to those advantages which before belonged to him purely as a member of the community" of which the right to hold and to transfer property to others was considered of utmost importance. *Id.*

37. See *Austin v. United States*, 113 S. Ct. 2801, 2807 (1993) (citing L. HARPER, THE ENGLISH NAVIGATION LAWS (1939)). The Navigation Acts of 1660 required the shipping of most commodities in English vessels. Violation of the Acts resulted in forfeiture of both the illegal cargo and the vessel that carried it, and were construed so that the act of an individual seaman could result in the forfeiture of the entire ship.

38. *Id.* at 2807. Forfeiture of estate for treason is proscribed by Article III Section 3 of the United States Constitution, but the United States Supreme Court has sanctioned forfeiture of estate for the life of the traitor. See *id.*

39. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974).

40. See *C. J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1943). The bulk of the statutes authorizing in rem forfeiture proceedings at the time of ratification were Customs and revenue laws. *Id.* at 145-48.

41. See *Calero-Toledo*, 416 U.S. at 683. Subsequently, in rem forfeiture was expanded to include vessels used to deliver slaves to foreign countries and, somewhat later, to this country.

statutes provided for proceedings in admiralty and were largely based on the English Navigation Acts.⁴² Prior to the introduction of statutory in rem forfeiture for narcotics offenses, admiralty was the primary arena for in rem forfeiture.⁴³

3. *In Rem Forfeiture for Narcotics Offenses*

Between 1914 and 1970, Congress enacted more than 50 pieces of legislation designed to control the use of drugs considered dangerous narcotics.⁴⁴ In 1970 Congress passed the Comprehensive Drug Abuse Prevention and Control Act.⁴⁵ This statute was designed to collect and conform all previous laws under one piece of legislation, thereby eliminating confusion in enforcement of narcotics laws.⁴⁶ The principle purpose of the Drug Control Act was "to deal in a comprehensive fashion with the growing menace of drug abuse in the United States."⁴⁷ Congress' primary goals when enacting the statute were prevention, rehabilitation and increased effectiveness of law enforcement.⁴⁸

As part of the effort to increase law enforcement effectiveness, the Comprehensive Drug Abuse Prevention and Control Act provided for forfeiture of controlled substances, raw materials and equipment used in their manufacture, conveyances used to transport or conceal controlled substances, books, records, and formulas used or intended for use in violation of the Act, and unlicensed plants from which controlled substances are derived.⁴⁹ In 1978 Congress amended the forfeiture provisions to include proceeds traceable to drug transactions, including money

42. Piety, *supra* note 22, at 935. During this period in England admiralty courts did not have jurisdiction over persons. This is most likely why, in admiralty jurisdiction, in rem forfeiture is primarily seen as a procedural tool designed to allow the court to obtain control over vessels whose owners may be far away.

43. In fact, 21 U.S.C. § 881(b) (1993) provides, "Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property"

44. H.R. Rep. No. 1444, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4571.

45. 21 U.S.C. § 801-§ 969 (1988).

46. H.R. Rep. No. 1444, reprinted in 1970 U.S.C.C.A.N. 4566, 4571.

47. *Id.* at 4567.

48. *Id.*

49. *Id.* at 4623-24.

and negotiable instruments.⁵⁰ A senate report on this amendment stated that forfeiture statutes were "penal in nature."⁵¹

In 1984, noting that "traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs,"⁵² Congress again amended the civil forfeiture provisions of the Drug Control Act to include real property.⁵³ Congress expressed a clear intent that the provisions for forfeiture of real property act as a "powerful deterrent" to the commission of drug offenses.⁵⁴

B. THE EIGHTH AMENDMENT

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁵⁵ Because bail, fines, and punishment have been associated primarily with the criminal process,⁵⁶ the Eighth Amendment was long understood to apply, perhaps exclusively, to criminal proceedings.⁵⁷

When determining the applicability of the Eighth Amendment to a specific case, courts traditionally refer to the meaning of the Amendment at the time of ratification.⁵⁸ The text of the Eighth Amendment was based on Article I, section 9 of the Virginia Declaration of Rights, which in turn adopted verbatim the language of the English Bill of Rights.⁵⁹ At the time of ratification, the acknowledged purpose of the Eighth Amendment was

50. H.R. Rep. No. 1193, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 9496, 9522.

51. *Id.* at 9522.

52. H.R. Rep. No. 1030, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374.

53. *Id.* at 3398.

54. *Id.* at 3378.

55. U.S. CONST. amend. VIII.

56. *Ingrahm v. Wright*, 430 U.S. 651, 664 (1977).

57. *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 262 (1989).

58. *Id.* at 264 n. 4.

59. *Solem v. Helm*, 463 U.S. 277, 285 n.10 (1983). *See also, Browning-Ferris*, 492 U.S. at 266. The English version, adopted in 1689, states "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." This statute was adopted after the accession of William and Mary, and was intended to curb the abuses of English judges under the reign on James II. *See id.* at 266-67.

to place limits on the power of the new government.⁶⁰ Additionally, courts then understood the word “fine” to mean “a payment to a sovereign for some offense.”⁶¹ Using strict historical interpretation, older Supreme Court cases declared that the Eighth Amendment was directed only at “those entrusted with the criminal law function of government.”⁶²

More recent Supreme Court decisions have held that when the scope rather than the applicability of the Eighth Amendment is at issue, this strict historical approach⁶³ must give way to a broader standard.⁶⁴ To determine the scope of the Eighth Amendment, the courts must “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁶⁵ Using this mode of inquiry, the Court concluded in *Browning-Ferris Industries v. Kelco Disposal*,⁶⁶ that “the history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.”⁶⁷ This conclusion implied that the scope of the Eighth Amendment may encompass civil cases in which the government actually or effectively imposes a fine payable directly to it.⁶⁸

Lower court decisions have split on the question of whether the Eighth Amendment applies to in rem civil forfeiture

60. See *Weems v. United States*, 217 U.S. 349, 372 (1910) (“[The] predominant political impulse [of proponents of the Bill of Rights] was distrust of power, and they insisted on constitutional limitations against its abuse.”); see also *Ingraham*, 430 U.S. at 666 (“At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights.”).

61. See *Browning-Ferris*, 492 U.S. at 265.

62. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). The Court emphasized that the original draft of the English Bill of rights provided that “[t]he requiring of excessive bail of persons committed in *criminal* cases and imposing excessive fines, and illegal punishments, to be prevented,” stating that the deletion of the reference to criminal cases was “insignificant.” *Id.* at 665.

63. *Id.* at 670-71, n. 39 (“The applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation.”).

64. See *Browning-Ferris*, 492 U.S. at 264 n. 4.

65. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

66. *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257 (1989).

67. *Id.* at 268.

68. For example, in civil forfeiture proceedings under 21 U.S.C. §§ 881(a)(4) and (a)(7), the United States government is in effect imposing a fine which is directly payable to it. See *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993).

proceedings. Many courts hold that the Eighth Amendment does not apply to such proceedings because they do not constitute punishment for a crime.⁶⁹ However, one court has held that some forfeitures may rise to the level of punishment, in which case the Eighth Amendment does apply.⁷⁰ *Austin v. United States*⁷¹ settles this split.

III. *AUSTIN v. UNITED STATES*

A. FACTS

On June 13, 1990, Keith Engebretson met Richard Lyle Austin at Austin's auto body repair shop.⁷² Engebretson agreed to purchase cocaine from Austin.⁷³ Austin left the body shop and went to his mobile home. He returned to the body shop a short time later and sold Engebretson two grams of cocaine.⁷⁴

Police searched Austin's business and residence pursuant to a duly executed search warrant.⁷⁵ The search revealed small

69. See, e.g., *United States v. On Leong Chinese Merchants Ass'n Bldg.*, 918 F.2d 1289 (7th Cir. 1990) (holding the Eighth Amendment does not apply to civil in rem proceedings which are remedial in nature); accord, *United States v. 508 Depot St.*, 964 F.2d 814 (8th Cir. 1992) (reluctantly agreeing that the Excessive Fines Clause does not apply to civil in rem forfeiture proceedings).

70. *United States v. 38 Whalers Cove Dr.*, 954 F.2d 29 (2d. Cir. 1992). The court, reading *United States v. Halper*, 490 U.S. 435 (1989) to apply to civil in rem forfeiture proceedings, held that the labels 'civil' and 'criminal' were not of paramount importance. See *Id.* at 35. The *Halper* court held that if a statute is "overwhelmingly disproportionate" and "without rational relation" to the purported goal of compensating the government, the statute is presumed punitive. *Halper*, 490 U.S. at 442. This is significant in the context of in rem forfeiture proceedings because they have often been justified as "liquidated damages" for the government's expense in enforcing the law. See, e.g., *One Lot of Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (holding forfeiture provides a reasonable form of liquidated damages and serves to reimburse the government for investigation and enforcement expenses).

71. *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993).

72. See *United States v. 508 Depot St.*, 964 F.2d 814, 815 (8th Cir. 1992) *rev'd sub nom Austin v. United States*, 113 S. Ct. 2801 (1993). All information about the facts of the case were taken from an affidavit submitted by Sioux Falls South Dakota police officer Donald Satterlee. See *Austin*, 113 S. Ct. at 2803.

73. *508 Depot St.*, 964 F.2d at 815. The opinion does not make clear Keith Engebretson's position with respect to either Mr. Austin, or the police department. It is possible that Engebretson was a confidential police informant; however, his actual status is unknown.

74. *Id.* at 816. Mr. Austin denies that he received any money from Mr. Engebretson.

75. *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993).

amounts of cocaine and marijuana, a .22 caliber revolver, drug paraphernalia, and \$4,700.00 in cash.⁷⁶ Austin was arrested and subsequently indicted on four counts of violating South Dakota's drug laws. Austin pleaded guilty and was convicted of one count of possessing cocaine with intent to distribute. He was sentenced to seven years imprisonment.⁷⁷

B. PROCEDURAL HISTORY

On September 7, 1990, the United States government filed an in rem action seeking the forfeiture of Austin's home and business.⁷⁸ Austin filed an answer to the complaint, objecting to the governments attempt to sieze his property.⁷⁹ The United States government moved for summary judgment in the forfeiture proceeding.⁸⁰ In opposition to summary judgment, Austin argued that forfeiture of his home and business violated the Excessive Fines Clause of the Eighth Amendment.⁸¹ The district court rejected Austin's argument and entered summary

76. *Id.*

77. *See Austin*, 113 S. Ct. at 2803.

78. *See id.*

The forfeiture action was filed pursuant to 21 U.S.C. §§ 881(a)(4) and (a)(7) which provide as follows:

(a) Subject property — the following shall be subject to forfeiture to the United States and no property right shall exist in them . . . : (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9) . . . : (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by the owner to have been committed or omitted without the knowledge or consent of that owner.

79. *See Austin*, 113 S. Ct. at 2803. In sum, Austin contended that the gun found in his body shop was used to shoot sparrows and that he received no money from Engebretson on June 13, 1990.

80. *See United States v. 508 Depot St.*, 964 F. 2d 814, 816 (8th Cir. 1992) *rev'd sub nom Austin v. United States*, 113 S. Ct. 2801 (1993).

81. *Id.* at 817.

judgment for the United States.⁸²

Austin appealed, again contending that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment.⁸³ The government argued that the Eighth Amendment was inapplicable because the forfeiture action was civil in nature.⁸⁴ The United States Court of Appeals for the Eighth Circuit reluctantly agreed with the government and affirmed.⁸⁵ The United States Supreme Court granted Austin's petition for certiorari⁸⁶ to resolve an apparent conflict between the decision in *United States v. 508 Depot Street*,⁸⁷ and the Second Circuit decision in *United States v. 38 Whalers Cove Drive*.⁸⁸

On July 28, 1993, the Supreme Court, in a unanimous decision,⁸⁹ resolved this conflict, holding that the Excessive Fines Clause of the Eighth Amendment is applicable to in rem forfeiture proceedings under 21 U.S.C. § 881.⁹⁰ This decision cracked open a door many believed long closed,⁹¹ the door to affording greater constitutional protection to claimants in civil forfeiture

82. *508 Depot Street*, 964 F.2d. at 816.

83. *Id.* at 817.

84. *Id.* The Court of Appeals was not convinced that the Eighth Amendment was restricted to criminal rather than civil proceedings. Instead it rested its decision on the guilty property fiction, noting that because this was an in rem action, the owner's culpability was apparently irrelevant. Despite its affirmance, the court observed that "it appears incongruous to require proportionality review for forfeitures when the government proceeds in personam, but not when the government proceeds in rem Legal niceties such as in rem and in personam mean little to individuals faced with losing important and/or valuable assets." *Id.* at 816.

85. *Id.* at 817. "We say 'reluctantly' because we believe that the principle of proportionality is a deeply rooted concept in the common law, and that as a modicum of fairness, the principle of proportionality should be applied in civil actions that result in harsh penalties." *Id.*

86. *United States v. 508 Depot Street*, 964 F.2d 814 (8th Cir. 1992), *cert. granted*, 113 S. Ct. 1036 (1993).

87. *United States v. 508 Depot Street*, 964 F.2d 814 (8th Cir. 1992) *rev'd sub nom* *Austin v. United States*, 113 S. Ct. 2801 (1993).

88. *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1992).

89. *Austin*, 113 S. Ct. at 2802. Blackmun, J., delivered the opinion of the Court in which White, Stevens, O'Connor and Souter, JJ. joined. Scalia, J., filed an opinion concurring in part and concurring in the judgment. Kennedy, J., filed an opinion concurring in part and concurring in the judgment, in which Renquist, C.J., and Thomas, J. joined.

90. *Austin*, 113 S. Ct. at 2812.

91. *See, e.g., United States v. On Leong Chinese Merchants Ass'n Bldg.*, 918 F.2d 1289 (7th Cir. 1990); *see also One Lot of Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972).

proceedings.⁹²

C. THE COURT'S ANALYSIS

1. *The Parties' Contentions*

Austin contended that the Excessive Fines Clause of the Eighth Amendment applied to in rem civil forfeiture proceedings.⁹³ The United States government put forth two main arguments. First, the Excessive Fines Clause does not govern civil proceedings unless they were recognized as criminal punishment at the time the Eighth Amendment was ratified.⁹⁴ Second, the Eighth Amendment does not apply to civil proceedings unless they are so punitive as to be considered criminal under the criteria stated in *Kennedy v. Mendoza-Martinez*⁹⁵ and *United States v. Ward*.⁹⁶

After an examination of the history of the Eighth Amendment, the Court expressly rejected the government's contention

92. In *Austin*, the Court declared that "forfeiture under 21 U.S.C. §§ 881(a)(4) and (a)(7) constitutes payment to a sovereign for the punishment of some offense." *Austin*, 113 S. Ct. at 2812.

93. *Austin*, 113 S. Ct. at 2804. The Court noted that they had previously announced in *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 (1989), that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to the government, but had found it unnecessary in that instance to determine whether the Clause applied only to criminal cases. *Id.*

94. *Id.*

95. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962). The criteria announced in *Mendoza-Martinez* are the same as those traditionally applied to determine whether an Act of Congress is penal or regulatory in character: "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." *Id.* at 168.

96. *United States v. Ward*, 448 U.S. 242 (1979). "Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Id.* at 248. In making the latter determination, both the District Court and the Court of Appeals found it useful to refer to the seven considerations listed in *Kennedy v. Mendoza-Martinez*. *Id.* at 249.

that the Eighth Amendment applies only to criminal proceedings.⁹⁷ The Court declared that the Eighth Amendment's original purpose was to limit the government's power to punish.⁹⁸ Accordingly, the correct inquiry is not whether the proceeding is criminal rather than civil, but whether the proceeding constitutes punishment.⁹⁹

2. *Was Forfeiture Considered Punishment When The Eighth Amendment Was Ratified?*

The Court first considered whether forfeiture was perceived as punishment at the time of the Eighth Amendment's ratification.¹⁰⁰ The Court examined the history of in rem forfeiture,¹⁰¹ then discussed early United States law providing for in rem forfeiture proceedings.¹⁰² The Court noted that the First Congress intended forfeiture laws as punishment for the intentional or negligent acts of *property owners*.¹⁰³

Next, the Court discussed its earlier cases that recognized

97. *Austin*, 113 S. Ct. at 2804-05. In making this determination, the Court noted that unlike other provisions of the Bill of Rights, the Eighth Amendment contains no language expressly limiting its application to criminal proceedings. The Court also concluded that there is nothing in the history of the Amendment that would mandate such a reading.

98. *Id.* at 2805. Interestingly, the Court cited the same language of the English Bill of Rights as was cited in *Ingrahm v. Wright*, 430 U.S. 651 (1977), noting that the original draft contained a limitation to criminal proceedings but the final provision as adopted did not. The *Ingrahm* Court saw this as an indication of the intent to limit the Amendment to criminal proceedings. The *Austin* Court found the opposite, stating essentially that had the Framers intended the Eighth Amendment to apply to criminal proceedings only, they certainly would have said so. Thus the Court reasoned that the absence of the criminal language compelled the conclusion that the Excessive Fines Clause may be applicable to civil proceedings. *Austin*, 113 S. Ct. at 2805.

99. *Austin*, 113 S. Ct. at 2805-06. The Court noted that the notion of punishment as we commonly understand it cuts across the division between civil and criminal law. *Id.* at 2805.

100. *Id.* at 2806.

101. *Id.* at 2806-07. The Court noted that the three types of forfeiture existing in England at the time the Eighth Amendment was ratified were deodand, forfeiture of estate, and statutory forfeiture under the Navigation Acts.

102. *Id.* at 2807-08.

103. *Id.* In the Act of July 31, 1789 Congress provided that goods could not be unloaded from vessels except during the day and with a permit. If the commander of a ship was negligent in permitting goods to be unloaded in violation of the statute, he was punished with a fine of four hundred dollars per offense. These statutes listed forfeiture of goods and vessel alongside the other provisions for punishment. Additionally, the Court found it of some interest and import that 'forfeit' was the word Congress used for 'fine'.

either implicitly or explicitly that forfeiture was punishment.¹⁰⁴ The Court noted that the same understanding of forfeiture ran through its decisions rejecting the “innocence of the owner” as a common law defense to forfeiture.¹⁰⁵ Referring to two theories of forfeiture—that the property is guilty of the offense and that the owner may be held liable for the actions of those to whom he entrusts his property—Justice Blackmun stated that “[b]oth theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence.”¹⁰⁶ Thus, while the Court recognized that the guilty property fiction had “a venerable history in our case law,”¹⁰⁷ the Court also stated that it “understood this fiction to rest on the notion that the owner who allows his property to become involved in an offense has been negligent.”¹⁰⁸

In the most recent civil forfeiture cases, the Court had reserved the question of whether the guilty property fiction could be used to forfeit the property of a truly innocent owner.¹⁰⁹ In the Austin Court’s view, there would be no reason to reserve that question if forfeiture did not punish the owner.¹¹⁰ “In sum, even though this Court had rejected the ‘innocence’ of the owner as a common-law defense to forfeiture, it consistently has recognized that forfeiture serves, at least in part, to punish the owner.”¹¹¹ The Court concluded that in rem forfeiture has *historically* been viewed as punishment.¹¹²

104. *Austin*, 113 S. Ct. at 2808-10. Justice Blackmun cites Chief Justice Marshall’s opinion in *Peisch v. Ware*, 8 U.S. (4 Cranch) 347 (1808), for the proposition that “the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance”

105. *Austin*, 113 S. Ct. at 2808.

106. *Id.*

107. *Id.* at 2808.

108. *Id.* at 2809. In *J.W. Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505, 510 (1921), the Court traced the roots of civil forfeiture to deodand, which Blackstone explained as a punishment for negligence.

109. *Austin*, 113 S. Ct. at 2809. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974), the Court noted that forfeiture of a truly innocent owner’s property would raise “serious constitutional questions.”

110. *Austin*, 113 S. Ct. at 2809. “Indeed it is only on the assumption that forfeiture serves in part to punish that the Court’s past reservation of that question makes sense.”

111. *Id.* at 2810.

112. *Id.*

3. *Is Forfeiture Punishment Today ?*

Next, the Court discussed whether forfeiture under 21 U.S.C. § 881 is properly considered punishment today.¹¹³ The Court found nothing in either the statute¹¹⁴ or in the legislative history of the statute¹¹⁵ to contradict the historical understanding of in rem forfeiture as punishment. The government argued that the applicable sections of the statute were remedial as opposed to punitive.¹¹⁶ Specifically, they argued: (1) the relevant statutory sections remove instruments of the drug trade, thereby protecting the community,¹¹⁷ and (2) the forfeited assets compensate the government for expenses incurred in fighting "the war on drugs."¹¹⁸

The Court rejected these contentions.¹¹⁹ The Court reasoned that because owning a business or a mobile home is not a criminal act, the government's attempt to characterize these properties as "instruments" of the drug trade must fail.¹²⁰ Furthermore, the Court stated that the dramatic variation in value of properties subject to forfeiture under 21 U.S.C. §§ 881 (a)(4)

113. *Id.* at 2810-12.

114. *Id.* at 2810. Unlike traditional statutory forfeiture, 21 U.S.C. § 881 provides for an "innocent owner defense" which, in the Court's opinion, serves to focus the statute's provisions even more clearly on the culpability of the owner of the property.

115. *Id.* at 2811. The Court noted that Congress has chosen to tie forfeiture directly to the commission of drug offenses. Furthermore, the Court considered the fact that when subsection (a)(7) was added to section 881 in 1984, Congress declared that "traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs," and characterized in rem civil forfeiture as a "powerful deterrent." *Id.* (citing S. Rep. No. 225, 98 Cong., 1st Sess. 191 (1983)).

116. *Austin*, 113 S. Ct. at 2811.

117. *Id.* at 2811. 21 U.S.C. § 881(a)(1) provides: "(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them: (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter." Note that *Austin* does not challenge the Government's right to seize contraband. Because this provision removes dangerous items and instrumentalities from circulation it is remedial on its face. *Austin's* challenge is under 21 U.S.C. §§ 881 (a)(4) and (a)(7), which provide for government seizure of conveyances and real property, neither of which are inherently dangerous.

118. *Id.* at 2811. 21 U.S.C. § 881(e) provides that forfeited property or the proceeds from the sale of forfeited property may be transferred by the Attorney General to federal, state, or local law enforcement agencies, to compensate them for expenses incurred in prosecuting the forfeiture.

119. *Id.*

Although seizure of contraband may serve this purpose, seizure of otherwise lawful real property and conveyances does not. *Id.* at 2812.

120. *Id.* at 2811.

and (a)(7) undercuts any argument that the value is rationally related to government expenses.¹²¹ “A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.”¹²² The Court therefore held that forfeiture under 21 U.S.C. § 881 constitutes payment to a sovereign as punishment for some offense, and as such is subject to the limitations of the Excessive Fines Clause of the Eighth Amendment.¹²³

IV. ANALYSIS OF *AUSTIN* v. *UNITED STATES*

In *Austin*, the Supreme Court held that government seizure of real and personal property in an in rem forfeiture proceeding is punishment.¹²⁴ In many ways, the Court’s holding raises more questions than it answers. It is now evident that the Eighth Amendment’s Excessive Fines Clause compels proportionality review of forfeitures conducted pursuant to 21 U.S.C. §§ 881(a)(4) and (a)(7).¹²⁵ However, it is not clear at what point a forfeiture becomes disproportionate. Additionally, while forfeiture constitutes punishment for Eighth Amendment purposes, it is unclear whether courts will expand this holding to encompass challenges under the Fifth Amendment.¹²⁶ Finally, courts must determine whether continued use of the guilty property fiction is consistent with the Supreme Court’s view that forfeiture punishes the culpable behavior of *individuals*. This comment will

121. *Austin*, 113 S. Ct. at 2812.

122. *Austin*, 113 S. Ct. at 2812 (citing *United States v. Halper*, 490 U.S. 434, 448 (1988)).

123. *Id.* The Court declined to announce a formula for determining whether a forfeiture is excessive under the Eighth Amendment stating that “prudence dictates that we allow the lower courts to consider that question in the first instance.” *Id.*

124. *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993).

125. *Id.*

126. U.S. CONST. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

explore each of these issues in turn.

A. COURTS MUST TAKE A "TOTALITY OF THE CIRCUMSTANCES" APPROACH TO ASSESSING PROPORTIONALITY

Because civil forfeiture does not fall squarely within the civil or the criminal realm, it presents an interesting conundrum with respect to proportionality review. Although technically a civil remedy, forfeiture under 21 U.S.C. §§ 881 (a)(4) and (a)(7) is punishment for an underlying criminal act.¹²⁷ Furthermore, a claimant who is punished by a civil forfeiture may, like Richard Austin, already have been punished criminally for the underlying offense. Because 21 U.S.C. §§ 881 (a)(4) and (a)(7) authorize the government's use of a civil remedy to punish a criminal act, courts should use both civil and criminal criteria to determine the proportionality of such forfeitures.

In the criminal context, the Court has announced three criteria courts should consider to determine whether a penalty is so disproportionate to the crime committed as to constitute cruel and unusual punishment:¹²⁸ (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions.¹²⁹

In *Alexander v. United States*,¹³⁰ the Court held that in personam forfeiture, also known as criminal forfeiture, is subject to the Excessive Fines Clause of the Eighth Amendment.¹³¹ The

127. See *Austin*, 113 S. Ct. at 2810; see also 21 U.S.C. § 881 (a)(7) (1988).

128. *Solem v. Helm*, 463 U.S. 277 (1983). Note that proportionality review is essentially the same under either the excessive fines clause or the cruel and unusual punishment clause. To be found cruel and unusual, a punishment must be "grossly disproportionate" to the crime committed. This standard encompasses the excessiveness standard so that if a punishment is cruel and unusual it must also be excessive.

129. *Id.* at 292; but see *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), for a criticism of these criteria. In *Harmelin*, two Justices believed that the Eighth Amendment contained no proportionality requirement and that *Solem v. Helm* should be overruled. They could not however, convince a majority that this was the case. The majority did agree that a sentence of life without parole for possession of 672 grams of cocaine was not disproportionate. The question after *Harmelin* was whether any sentence short of death could be found disproportionate and thus cruel and unusual.

130. *Alexander v. United States*, 113 S.Ct. 2766 (1993) (remanding for a review of proportionality).

131. See *id.* at 2775-76.

Court, in an opinion authored by Chief Justice Rehnquist, suggested that proportionality review should consider whether there was a sufficient connection between the property and the criminal activity to justify the forfeiture.¹³² Justice Scalia, in his concurring opinion in *Austin* likewise suggested that “[t]he relevant inquiry for an excessive forfeiture under § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, guilty and hence forfeitable?”¹³³

The *Austin* majority declined to put forth any specific approach to proportionality analysis, preferring to leave it to the lower courts.¹³⁴ Because the overwhelming majority of lower courts prior to the *Austin* decision held that the Eighth Amendment was inapplicable to civil forfeiture proceedings, they seldom reached the issue of proportionality.¹³⁵ As a result, lower court opinions provide little or no guidance on approaches to proportionality review in the civil context. Lower court decisions expressing an opinion on proportionality appear to assume that as long as the forfeiture was authorized by the statute, it could never be found excessive.¹³⁶

By refusing to announce a standard by which proportionality should be judged, the Supreme Court has extended no protection against excessive punishment to claimants in civil forfeiture actions. The landmark decision in *Austin* will thus have no impact unless lower courts take an active role. In view of the dual nature of civil forfeiture, courts would be well advised to take a “totality of the circumstances” approach and consider both the civil and the criminal criteria for proportionality.

132. *Id.* at 2767.

133. *Austin*, 113 S. Ct. at 2815.

134. *Id.* at 2812.

135. *See, e.g.*, *United States v. On Leong Chinese Merchants Association Building*, 918 F.2d 1289 (7th Cir. 1990); *accord United States v. 508 Depot Street*, 964 F.2d 814 (8th Cir. 1992).

136. *See, e.g.*, *United States v. 566 Hendrickson Blvd.*, 986 F.2d 990 (8th Cir. 1993). (upholding the seizure of claimant’s home based on the presence of two marijuana plants and various greenhouse implements found in the attic). The majority stated that “assuming arguendo that the Eighth Amendment’s protections do extend to the forfeiture of the claimant’s home, the line at which forfeiture becomes disproportionate punishment or an excessive fine has not been crossed.” *Id.* at 999. The court, using reasoning which seems circular at best, determined that the “line” was not crossed because the seizure was authorized by the statute. *Id.*

Courts should consider: (1) the gravity of the offense; (2) the relationship of the property to the underlying crime; and (3) the severity of any criminal sentence already imposed. The "guilt" of the property is not easily separated from the guilt of the property owner. By viewing the forfeiture in light of the totality of circumstances surrounding it, courts will be able to more accurately determine whether a particular forfeiture is disproportionate.

B. THE AUSTIN HOLDING SHOULD NOT BE LIMITED TO CHALLENGES UNDER THE EXCESSIVE FINES CLAUSE

Arguably, the Court's holding in *Austin* could be construed narrowly so as to apply only when a proceeding is challenged under the Eighth Amendment's Excessive Fines Clause. Justice Scalia argues that excessiveness inquiry is appropriate because in rem forfeiture is a *fine*, but would have come to this conclusion without engaging in the "misleading discussion of culpability."¹³⁷ Ostensibly, such a construction would limit challenges to in rem forfeiture proceedings to excessiveness grounds, as there are no other express constitutional limitations on *fin*es.

The majority of the Court, however, did not expressly or implicitly restrict its holding to cases challenged under the Eighth Amendment's Excessive Fines Clause. Instead, the Court stated that "forfeiture under [21 U.S.C. § 881(a)(4) and (a)(7)] constitutes 'payment to a sovereign as punishment for some offense' and, *as such*, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause."¹³⁸ Logic dictates that if a proceeding is punitive, it remains punitive whether challenged as excessive under the Eighth Amendment or, for example, as a violation of the Double Jeopardy Clause of the Fifth Amendment. Accordingly, courts should not limit the *Austin* holding to instances where a civil forfeiture proceeding is challenged as excessive.

137. *Austin v. United States*, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring in part and concurring in the judgment). Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas shared Justice Scalia's view that any discussion of culpability was inappropriate and unnecessary. *Id.* at 2815.

138. *Id.* at 2812 (emphasis added).

C. EXTEND FIFTH AMENDMENT PROTECTIONS TO CLAIMANTS IN CIVIL FORFEITURE PROCEEDINGS

Civil law is concerned primarily with *private* rights and remedies.¹³⁹ Criminal law on the other hand is concerned with preventing harm to *society*.¹⁴⁰ To achieve this goal, criminal law declares what conduct is prohibited, and prescribes the punishment imposed for such conduct.¹⁴¹ Though these definitions are helpful in drawing broad distinctions, they are also misleading.¹⁴² In practice, the distinction between civil and criminal law is often blurred. Modern courts use civil remedies such as in rem forfeiture to achieve the goal of "punishing anti-social behavior."¹⁴³ Consequently there exists an expanding gray area in which civil and criminal law overlap.¹⁴⁴

In the late nineteenth century, the United States Supreme Court examined in rem forfeiture and determined that although labeled civil, such proceedings were criminal in nature.¹⁴⁵ Over the next century, however, the Court retreated from this holding, following it in only two cases.¹⁴⁶ Even the Court's opinion in

139. See BLACK'S LAW DICTIONARY 246 (6th ed. 1990).

140. See BLACK'S LAW DICTIONARY 374 (6th ed. 1990).

141. See *id.*

142. These definitions lead one to the conclusion that the boundaries between civil and criminal law are solid and airtight, when in actuality they are somewhat amorphous and malleable. See generally Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991).

143. *Id.* at 1325.

144. *Id.* at 1325-27. Some examples of civil remedies used to achieve criminal law objectives cited by Professor Cheh are injunctions, forfeitures, restitution and civil fines. Professor Cheh also notes that many states are using civil law techniques to check domestic violence, drug trafficking, weapons possession, and racial harassment. "[U]sing civil remedies to redress criminal behavior is not new . . . Yet the current phenomenon of civil remedies blending with criminal sanctions never has been more actively or consciously pursued." *Id.* at 1327.

145. *Boyd v. United States*, 116 U.S. 616 (1886) (holding that requiring a claimant in a civil forfeiture action to produce personal papers was a violation of the Fourth and Fifth Amendments). "We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal . . ." *Id.* at 633-34.

146. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (holding that the exclusionary rule applies to civil forfeiture proceedings). "As Mr. Justice Bradley aptly pointed out in *Boyd*, a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.* at 700. Accord *United States v. United States Coin & Currency*, 401 U.S.

Austin, which extended Eighth Amendment protection to claimants in civil forfeiture proceedings, fell short of declaring that such proceedings are either criminal or "quasi-criminal." Thus the *Austin* decision widened the gray area between civil and criminal law as it pertains to forfeiture, perhaps to the point of irreconcilability.

According to *Austin*, civil forfeiture under 21 U.S.C. §§ 881(a)(4) and (a)(7) constitutes payment to a sovereign as punishment for some offense.¹⁴⁷ The underlying "offenses" which justify forfeiture under these statutory sections, are *criminal* drug offenses.¹⁴⁸ It follows that forfeiture under this title, although labeled civil, is actually *punishment* for a *criminal* offense. Furthermore, a critical look at the statute's intent and effect leads to the inevitable conclusion that the statute is at least quasi-criminal. Strict retention of the civil label would mean that courts continue to withhold certain constitutional protections.¹⁴⁹

The Fifth Amendment provides in pertinent part: "No person shall be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"¹⁵⁰ Courts should examine each of these Fifth Amendment provisions in light of

715 (1971) (holding the Fifth Amendment's self-incrimination clause and the resulting "right" to remain silent, are applicable in civil forfeiture proceedings despite the fact that production of papers is compelled under the forfeiture statute). Citing *Boyd*, the Court noted that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes." *Id.* at 718.

147. *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993).

148. *Id.* at 2811. The Court noted, "Congress has chosen to tie forfeiture directly to the commission of drug offenses. Thus, under § 881(a)(4), a conveyance is forfeitable if it is used or intended for use to facilitate the transportation of controlled substances, their raw materials, or the equipment used to manufacture or distribute them. Under § 881(a)(7), real property is forfeitable if it is used or intended for use to facilitate the commission of a drug-related crime punishable by more than one year's imprisonment." *Id.*

149. The most notably absent protections include the right to be free from government seizures absent due process of law, and prohibition against double jeopardy. U.S. CONST. amend. V. Other protections reserved specifically to criminal trials but not discussed in this article are the various Sixth Amendment protections. Additionally, because of the civil label in forfeiture proceedings, the claimant has no right to the presumption of innocence until proven guilty beyond a reasonable doubt.

150. U.S. CONST. amend. V.

the decision in *Austin v. United States*.¹⁵¹

1. *Double Jeopardy*

The Supreme Court has held that the Double Jeopardy Clause of the Fifth Amendment does not apply in civil forfeiture proceedings.¹⁵² In *Helvering v. Mitchell*, the Court held that “Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish *criminally* for the same offense.”¹⁵³ Double Jeopardy did not bar civil forfeiture actions because Congress could impose both a criminal and a civil sanction for the same underlying act.¹⁵⁴

In *United States v. Halper*, the Court backed away from the more restrictive view that the Double Jeopardy Clause applied only to *criminal* punishments.¹⁵⁵ The Court included “multiple punishments for the same offense” as one of the abuses Congress intended the Double Jeopardy Clause to protect against.¹⁵⁶ The Court also suggested that a civil sanction, although justified as remedial, could be so divorced from the government’s damages and expenses as to constitute punishment.¹⁵⁷

Halper held that a civil penalty would be considered punishment if it “may not fairly be characterized as remedial, but *only* as a deterrent or retribution.”¹⁵⁸ The *Austin* Court broadened *Halper* by emphasizing the *Halper* Court’s statement that “a civil sanction that cannot fairly be said *solely* to serve a

151. 113 S. Ct. 2801 (1993).

152. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (holding that an individual is “in jeopardy” for Fifth Amendment purposes only when an action is essentially criminal); see also *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972).

153. *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

154. See *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972).

155. *United States v. Halper*, 490 U.S. 435 (1989) (emphasis added).

156. *Id.* at 440.

157. See *id.* at 449-50. See also Lawrence A. Kasten, *Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 225 (1991).

158. *Halper*, 490 U.S. at 449 (emphasis added).

remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment"¹⁵⁹ On this basis, the Court held that forfeiture under §§ 881(a)(4) and (a)(7) is punishment.¹⁶⁰

Because forfeiture under §§ 881(a)(4) and (a)(7) is punishment, the Double Jeopardy clause should prohibit the government from using forfeiture to punish a claimant who has already been punished criminally for the same underlying offense. Richard Lyle Austin, for example, was convicted of possession with intent to distribute cocaine and sentenced to seven years in prison. Because the subsequent civil forfeiture action against Austin's home and business constituted punishment for the same underlying offense, the forfeiture action should have been barred by the Double Jeopardy Clause.

One solution to this constitutional dilemma is to hold a pre-seizure forfeiture hearing at the same time as the criminal sentencing.¹⁶¹ This approach allows courts to consider together all aspects of the claimant's punishment, including prison sentence and forfeiture. The "dual hearing" approach also preserves the government's ability to use forfeiture to punish illegal activity while providing greater protection to claimant/defendants. Furthermore, Congress has recognized that "forfeiture of more significant amounts of drug related property would likely be achieved if the judge and jury considering the criminal case were also permitted to determine the forfeiture issue"¹⁶² Finally, the government would still retain the authority to summarily seize any contraband or otherwise inherently dangerous property.¹⁶³

159. *Id.* at 448 (emphasis added).

160. *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993) ("In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose.").

161. On December 13, 1993, six months after *Austin*, the United States Supreme Court held that "in the absence of exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard." *United States v. Good*, 114 S. Ct. 492, 497 (1993).

162. H.R. Rep. No. 1030, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3393.

163. 21 U.S.C. § 881 (a)(1) provides for summary seizure of all controlled

Possibly the best solution is to eliminate civil forfeiture by merging its provisions with those of criminal forfeiture. The Comprehensive Drug Abuse Prevention Act,¹⁶⁴ in addition to containing provisions for civil forfeiture, also contains provisions for criminal forfeiture.¹⁶⁵ Under these provisions, the forfeiture must be alleged in the information and indictment.¹⁶⁶ If the defendant is found guilty, the court must return a special verdict as to the forfeiture allegations and must enter a judgment of forfeiture against the defendant.¹⁶⁷ Only then is the government authorized to seize the property.¹⁶⁸ Determining the extent of a claimant/defendant's punishment in a single proceeding would eliminate any Double Jeopardy concerns. Moreover, merging civil and criminal forfeiture would provide greater protection against government abuses by conferring on the claimant/defendant all of the protections of a criminal proceeding.¹⁶⁹ This would ensure that justice is served and would protect the government's ability to use forfeiture as a powerful weapon in the "war on drugs."

2. *Due Process—The Burden of Proof*

Generally, when seeking to impose some civil penalty, the government must demonstrate proof by a preponderance of the evidence.¹⁷⁰ Yet, when prosecuting a civil forfeiture action under 21 U.S.C. §§ 881(a)(4) and (a)(7), the government need prove only that it had probable cause to believe that the property is subject to forfeiture.¹⁷¹ Once the government has met this burden, the burden of producing evidence and the burden of persuading the trier of fact shift to the claimant. In short, the property owner must prove by a preponderance of the evidence that

substances.

164. 21 U.S.C. §§ 801-969 (1988).

165. 21 U.S.C. § 853 (1993).

166. H.R. Rep. No. 1030, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3376.

167. *Id.* at 3376-77.

168. *Id.*

169. This would not only include the Fifth Amendment protections (*supra* note 152 and accompanying text), but presumably Sixth Amendment protections as well.

170. *United States v. Regan*, 232 U.S. 37, 48 (1914).

171. 21 U.S.C. § 881(d) incorporates the requirements of seizure pursuant to U.S. customs law, which require only an initial showing of probable cause. 19 U.S.C. § 1615. *See also* *United States v. Santoro*, 866 F. 2d 1538, 1544 (4th Cir. 1989).

his or her property is innocent of wrongdoing.¹⁷²

Ostensibly, the current allocation of the burden of proof in forfeiture proceedings under 21 U.S.C. §§ 881(a)(4) and (a)(7) is constitutional.¹⁷³ However, opinions upholding the constitutionality of the burden-shifting provisions of the statute have relied on characterization of the proceedings as civil.¹⁷⁴ Courts must reconsider the constitutionality of the statute's burden shifting provisions in light of *Austin*.

Austin implicitly recognizes that, although civil forfeiture proceedings are technically proceedings in rem, property owners must have acted in some culpable manner to come within the scope of the statute.¹⁷⁵ The *Austin* decision further acknowledges that forfeiture of real property and conveyances under 21 U.S.C. §§ 881(a)(4) and (a)(7) constitutes punishment of the property owner for his or her culpable acts.¹⁷⁶ Additionally, the statute requires that the property owner's culpable behavior be criminal.¹⁷⁷ Because the statute's burden shifting provisions only require the government to show probable cause, the statute enables the government to punish individuals for criminal acts by depriving them of property interests, without proving that they committed the acts for which they are being punished. The current allocation of the burden of proof thus substantially increases the risk of erroneous deprivation of property.¹⁷⁸ In the abstract this result is illogical. In application, it shocks the conscience. Any process which encourages the government to punish

172. See generally Peter Petrou, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822 (1984).

173. *United States v. Santoro*, 866 F. 2d 1538 (4th Cir. 1989) (holding the burden shifting aspect of 21 U.S.C. § 881 (a)(7) constitutional, because "Congress may alter the burden of proof in a civil proceeding as it sees fit."). See also *United States v. \$250,000 in U.S. Currency*, 808 F.2d 895 (1st Cir. 1987).

174. See, e.g., *\$250,000 in U.S. Currency*, 808 F.2d at 900.

175. See *Austin v. United States*, 113 S. Ct. 2801, 2806-12 (1993).

176. See *Austin*, 113 S. Ct. at 2812.

177. 21 U.S.C. § 881(a)(7), for example, provides that property is subject to forfeiture if it has been used or intended for use in a violation punishable by greater than one year imprisonment.

178. Moreover, consider the probable outcome of a forfeiture proceeding in which the claimant chooses to exercise his or her privilege against self-incrimination. If the claimant does not speak, the claimant cannot win. Arguably, the allocation of the burden of proof thus also places an undue burden on the exercise of the privilege against self-incrimination.

culpable behavior without first proving it is not due process of law. The burden of proof requirements in civil forfeiture proceedings must be changed.

To comport with requirements of due process, the government arguably should bear the burden of proving culpability by at least a preponderance of the evidence, as it must in other civil proceedings. However, requiring the government to meet only a preponderance standard may encourage the government to forgo criminal proceedings in favor of forfeiture proceedings because of the lesser burden of proof.

Because forfeiture proceedings punish the alleged *criminal* acts of the claimant, the standard of proof should be akin to proof beyond a reasonable doubt as required in criminal proceedings. Courts should eliminate the government's incentive to choose forfeiture over criminal charges by requiring the government to meet a clear and convincing standard of proof. By eliminating incentive for abuse, the clear and convincing standard provides the greatest protection to claimant/defendants.

D. DISCARD THE GUILTY PROPERTY FICTION

With its decision in *Austin*, the United States Supreme Court has explicitly recognized that in rem forfeiture punishes property owners for their culpable acts or omissions.¹⁷⁹ It is difficult to reconcile the *Austin* holding with the continued use of the guilty property fiction. *Austin* makes clear that the culpability of the property owner is the underlying concern of civil forfeiture proceedings.¹⁸⁰ The culpability of the *owner* determines whether his property is forfeitable.¹⁸¹ The forfeiture of the

179. Furthermore, the Court in *Austin* stated that forfeiture has been justified both historically and in modern cases as punishment for negligent acts of the owner of the property. *Austin v. United States*, 113 S. Ct. 2801, 2806-10 (1993).

180. If culpability of the property owner were irrelevant to in rem forfeiture proceedings under 21 U.S.C. § 881, there would be no reason to make an exception for innocent owners. *Austin* states, "In light of . . . the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner . . . we cannot conclude that forfeiture under [this section] serves solely a remedial purpose." *Austin*, 113 S. Ct. at 2812.

181. 21 U.S.C. §§ 881(a)(4) and (a)(7) provide that property used in violation of title 21 is subject to forfeiture. The owner's use of his or her property, or the owner's negligence in allowing his or her property to be used in violation of the law is what renders the property subject to forfeiture.

property punishes the property *owner*. Thus the forfeiture proceeding is not against the property in any real or logical sense. The guilty property fiction now exists in name only. Continued use of the guilty property fictions impedes the court's ability to extend needed constitutional protections to claimants in civil forfeiture proceedings.¹⁸² For all of these reasons, the United States Supreme Court should officially and finally discard the guilty property fiction.

V. CONCLUSION

The Supreme Court's decision in *Austin* answered one compelling question: whether the Excessive Fines Clause of the Eighth Amendment applies to in rem forfeiture proceedings. In rem forfeiture under the Drug Abuse Prevention and Control Act constitutes payment to a sovereign as punishment for some offense. Under 21 U.S.C. § 881, the offense underlying the forfeiture must be a criminal drug offense. Because forfeiture under § 881 thus constitutes punishment for a criminal offense, courts must extend Fifth Amendment protections to claimants in forfeiture proceedings prosecuted under this title. These protections include the prohibition against double jeopardy, and the right to be deprived of property only after due process of law. Proportionality review under either the Excessive Fines Clause or the Cruel and Unusual Punishment Clause must take into account the totality of the circumstances of the forfeiture. Considering the widespread abuse of in rem forfeiture, extending these constitutional protections is necessary to protect the citizenry of this nation, and to preserve the fundamental principles that are the foundation of our system of government.

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182. See *supra* text accompanying notes 141-51.

183. Golden Gate University School of Law, class of 1995. The author wishes to extend her sincere thanks to Kevin Hunsaker, Professor Robert Calhoun, and Professor Barbara Anscher for their assistance and advice in the preparation of this comment.